AFFIRMATIVE ACTION AND COMPELLING INTERESTS: EQUAL PROTECTION JURISPRUDENCE AT THE CROSSROADS

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In the last few years we have witnessed a string of important decisions by the federal courts of appeals addressing the constitutionality of benign, race-conscious governmental actions. Though all apply the "strict scrutiny" standard of review mandated by recent decisions of the Supreme Court, the appellate courts have reached strikingly different conclusions regarding the permissibility of race-conscious government decision making. Underlying these decisions, moreover, is a disagreement regarding the very nature of strict scrutiny review: some courts view it as requiring an essentially ad hoc assessment of the importance of, and need for, race-conscious measures, while others view the doctrine as imposing much more severe constraints on governmental power. The disagreement has not been resolved by the Supreme Court, and indeed points to a deep-seated ambiguity and tension within the Court's opinions. This Article looks at the nature of the theoretical divisions that underlie these appellate decisions, and more broadly, their implications for equal protection theory.

I. AFFIRMATIVE ACTION IN THE COURTS

A. The Supreme Court and Standards of Review

When historians look back on the Rehnquist Court, there are two aspects of its jurisprudence that are likely to be deemed pathbreaking. First, and probably foremost, is the Rehnquist Court's resurrection of federalism-based limits on congressional authority. The extensive caselaw has dominated both the docket and headlines in recent years. Relevant decisions range from reinterpretations of the Commerce Clause,[1] to narrow constructions of Section 5 of the Four-

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[1]*See* United States v. Morrison, 529 U.S. 598 (2000) (holding that the Commerce Clause did not provide Congress with authority to enact the Violence Against Women Act); United States v.

teenth Amendment,[2] to expansions of state sovereign immunity,[3] and the discovery of nontextual, federalism-based limits on congressional power to regulate states as states.[4] Today most commentators, both scholarly and otherwise, seem to agree that the New Federalism is *the* great innovation of the Rehnquist Court. If one looks back a few years, however, to the summer of 1995, the picture was quite different. Certainly federalism was on the Court's agenda—after all, *United States v. Lopez* had just been decided, and *New York v. United States* was already on the books. The long-term significance of these decisions, however, was far from clear, and it is fair to say that no one expected the surge in judicial activism that we have seen in the past few years. Indeed, many would have said that the most important recent decisions of the Supreme Court were not in the federalism area at all, but instead were two decisions addressing race-conscious government action: *City of Richmond v. J.A. Croson Co.*,[5] and *Adarand Constructors, Inc. v. Pena*.[6] These decisions together established that *all* race-conscious governmental actions, whether state or federal, benign or discriminatory, when challenged under the Equal Protection Clause[7] were subject to the highest standard of constitutional review, strict scrutiny, which Gerald Gunther famously described as "'strict' in theory and fatal in fact."[8] To observers, therefore, these decisions very possibly spelled the end of all governmental affirmative action programs. If one had asked commentators at that time what the "legacy" of the Rehnquist Court was likely to be, they would probably have pointed to these decisions.

To understand the significance of the *Croson* and *Adarand* decisions, it is necessary to take a step back and remember where the law in this area stood just ten years earlier. As of that time, the Burger

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Lopez, 514 U.S. 549 (1995) (holding that Gun-Free School Zones Act exceeded congressional authority under the Commerce Clause).

[2] *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (finding of immunity for states in age discrimination suits); *Morrison*, 529 U.S. at 598; City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that Religious Freedom Restoration Act exceeded congressional authority).

[3] *See Kimel*, 528 U.S. at 62; Alden v. Maine, 527 U.S. 706 (1999) (prohibiting Congress from subjecting states to suit in state courts without their consent); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (barring Congress from removing states' immunity under Indian Commerce Clause authority).

[4] *See* Printz v. United States, 521 U.S. 898 (1997) (disallowing congressional mandate that forced state officers to execute federal background check laws); New York v. United States, 505 U.S. 144 (1992) (rejecting provision of federal law forcing states to "take title" of radioactive waste).

[5] 488 U.S. 469 (1989).

[6] 515 U.S. 200 (1995), *cert. granted sub nom.* Adarand v. Mineta, 121 S. Ct. 1401 (2001), *cert. dismissed as improvidently granted*, 122 S. Ct. 511 (2001).

[7] To be precise, in the case of federal programs, the challenges were premised on the "equal protection component" of the Due Process Clause of the Fifth Amendment. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

[8] Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); *but see Adarand*, 515 U.S. at 237 ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'").

Court had issued three important decisions considering the constitutionality of benign, race-conscious governmental actions: *Regents of the University of California v. Bakke*,[9] *Fullilove v. Klutznick*,[10] and *Wygant v. Jackson Board of Education*.[11] In none of these three decisions was the Court able to produce a majority opinion, or even to agree on what the relevant constitutional analysis should be. In toto, therefore, these opinions produced profound confusion regarding the circumstances under which governments were permitted to engage in race-conscious decision making, and regarding the standard of constitutional review applicable to such decisions. There were hints in certain opinions—notably Justice Powell's separate opinion in *Bakke* and his plurality opinion in *Wygant*—that at least with respect to *state* race-conscious action, the standard should be strict scrutiny, but in none of these cases was a majority of the Court able to come to agreement.

This doctrinal uncertainty was put to rest during the first decade of the Rehnquist Court. First, in *Croson*, a clear majority of the Court agreed that whatever the rule for federal programs, all race-conscious decisions by state governments (and their subdivisions) must be subject to strict scrutiny.[12] Then, in *Metro Broadcasting, Inc. v. FCC*,[13] a quite different majority of the Court held that benign race-conscious measures created by Congress are subject only to "intermediate scrutiny," once again resolving the doctrinal uncertainty of the Burger Court. Finally, in *Adarand* the Court overruled *Metro Broadcasting* and extended the strict scrutiny standard to *all* race-conscious governmental actions, whether adopted by the federal government or by state governments.[14]

Since the *Adarand* decision in 1995, the Court has issued no significant decisions regarding affirmative action or other benign, race-conscious governmental programs.[15] This deafening silence stands in

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[9] In *Bakke*, the Court struck down a special admissions program at the Medical School of the University of California at Davis, which set aside a specified portion of seats at the Medical School for members of ethnic minority groups who were "from economically and/or educationally disadvantaged backgrounds." 438 U.S. 265, 272 n.1 (1978).

[10] 448 U.S. 448 (1980). In *Fullilove*, the Court upheld a federal program that set aside ten percent of funds awarded to support local public works projects, requiring that such funds be used to procure goods or services from minority-owned businesses.

[11] 476 U.S. 267 (1986). In *Wygant*, the Court struck down a provision of a collective bargaining agreement between a local school board and a teachers' union that granted preferential protection against layoffs, under certain circumstances, to racial minorities.

[12] 488 U.S. at 493-94 (plurality opinion); *id.* at 520 (Scalia, J., concurring in the judgment). Admittedly, the *Croson* Court also did not produce a single, majority opinion, but unlike in earlier cases, there were five unambiguous votes for a particular standard of review, and a majority of the Court did join the portion of Justice O'Connor's opinion applying the strict scrutiny standard. In both of these respects, the decision reflects a clear departure from the legal uncertainty of the Burger Court decisions.

[13] 497 U.S. 547, 564-65 (1990).

[14] *Adarand*, 515 U.S. at 235 ("Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.").

[15] The Court has decided a number of cases challenging the constitutionality of race-based redistricting. *See, e.g.*, Hunt v. Cromartie, 532 U.S. 234 (2001); Bush v. Vera, 517 U.S. 952

stark contrast to both the stream of federalism-related cases recounted above, and to the Court's continued activism in other areas of equal protection jurisprudence.[16] Apparently, the Supreme Court believes that once the constitutional standard of review for race-conscious programs was settled, the law was clear and therefore the Court's work in this area was done. However, an examination of recent decisions by the federal courts of appeals reveals widespread disagreement and confusion regarding the constitutionality of race-conscious official action. Despite facial unanimity regarding the applicable standard of review, courts differ widely in how they implement the strict scrutiny standard. In particular, there is an explicit and widening division among the courts of appeals regarding the kinds of governmental objectives that are sufficiently "compelling" to justify race-conscious actions that disfavor the majority race, a division the Supreme Court has studiously avoided resolving. A study of this caselaw seriously undermines the Supreme Court's confidence that the law in this area is settled.[17] More fundamentally, the caselaw also brings into question the wisdom and value of the Court's continued reliance on tiered standards of review as *the* crucial component of its equal protection jurisprudence, without any examination or explication of what those tiers of review *mean* in practice. It is to this caselaw that I will now turn.

B. The Courts of Appeals and the Search for Compelling Interests

As noted above, since the Supreme Court's decisions in *Croson* and *Adarand*, there have been a number of cases decided by the United States Courts of Appeals addressing the constitutionality of race-conscious governmental programs. In all of these cases, the deciding court has applied the prevailing "strict scrutiny" standard mandated by the Supreme Court, which requires that to survive constitutional review, a racial classification "must serve a compelling governmental interest, and must be narrowly tailored to further that interest."[18] The courts have diverged in determining precisely what

(1996); Shaw v. Hunt, 517 U.S. 899 (1996). In my opinion, however, those cases raise quite different issues from traditional affirmative action cases.

[16] *See, e.g.*, Nguyen v. INS, 121 S. Ct. 2053 (2001) (holding that imposition of different requirements for citizenship depending on whether citizen parent is mother or father is consistent with equal protection principles); *Cromartie*, 532 U.S. at 234; Miller v. Albright, 523 U.S. 420 (1998); M.L.B. v. S.L.J., 519 U.S. 102 (1996); Romer v. Evans, 517 U.S. 620 (1996); Shaw v. Hunt, 517 U.S. 899 (1996); Bush v. Vera, 517 U.S. 952 (1996); United States v. Virginia, 518 U.S. 515 (1996).

[17] I have noted elsewhere that there might be reasons, rooted in the peculiar institutional structure of the Supreme Court, why the Court has focused unduly on choosing a "standard of review," while ignoring the practical implementation and consequences of its jurisprudence. *See* Ashutosh Bhagwat, *Separate but Equal? The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power,"* 80 B.U. L. REV. 967, 978-80, 993-1002 (2000).

[18] *Adarand*, 515 U.S. at 235.

sorts of governmental objectives qualify as sufficiently "compelling" to justify race-conscious official decision making. In particular, courts have differed over whether the universe of such compelling interests is limited (perhaps only to one interest), or whether it is open-ended. This is obviously a critical question, because governments are flatly forbidden from using racial criteria in their actions absent a compelling justification (though even if supported by a compelling interest, the governmental program must still be narrowly tailored), and so a limited universe of compelling interests would severely restrict governments' abilities to take explicit account of race.

The leading case for the restrictive view of compelling interests is unquestionably *Hopwood v. Texas*,[19] decided by the Fifth Circuit in 1996. *Hopwood* involved an equal protection challenge to the admissions policy of the University of Texas Law School, which granted preferential treatment to applicants who belonged to specified minority groups (to be precise, African-Americans and Mexican-Americans).[20] The Fifth Circuit struck down the law school's admissions policy, relying on two holdings. First, the court held that diversity—that is, achieving a diverse student body—simply did not qualify as a compelling governmental interest for equal protection purposes. Relying on various statements from plurality and dissenting Supreme Court opinions, the Fifth Circuit concluded that a majority of the Supreme Court had rejected diversity as a compelling interest, and indeed suggested that perhaps the *only* governmental interest sufficiently compelling to justify the use of race was remedying the present effects of prior discrimination by *that* governmental body.[21] Second, the court held that the law school could not establish a compelling interest in remedying past discrimination because it could not demonstrate any present effects of past discrimination by the law school.[22] The crucial, and most controversial, holding in *Hopwood*, however, was the first: *as a matter of law*, diversity does not qualify as a compelling governmental interest.[23]

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[19] 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

[20] *Id.* at 934.

[21] *Id.* at 944-46. The Fifth Circuit acknowledged that in *Bakke*, Justice Powell had indicated that diversity did constitute a compelling governmental interest, but held that "Justice Powell's view in *Bakke* is not binding precedent on this issue." *Id.* at 944. In a subsequent appeal in the *Hopwood* case, the Fifth Circuit recently reaffirmed this aspect of its *Hopwood* holding under the law of the case doctrine because the holding "did not rise to the level of clear error. . . ." Hopwood v. Texas, 236 F.3d 256, 275 (5th Cir. 2000).

[22] *Id.* at 955. In the course of reaching this conclusion, the court also rejected the view that the law school was permitted to adopt race-conscious measures in order to remedy discrimination by larger governmental bodies, such as the State of Texas or the University of Texas as a whole.

[23] One of the three judges issued a concurring opinion declining to join the majority's broad holding regarding the permissible scope of compelling interests. *Id.* at 963-65 (Wiener, J., specially concurring).

Other than the Fifth Circuit, the only other court that has come close to adopting such a restrictive view of compelling governmental interests is the District of Columbia Circuit, in *Lutheran Church-Missouri Synod v. FCC*.[24] In *Lutheran Church*, a church that ran two radio stations challenged FCC regulations requiring radio stations to maintain affirmative action hiring programs for women and minorities. The justification offered by the FCC for its regulations was the desire to foster diverse programming content, which the court understood to mean programming that reflects minority tastes and viewpoints.[25] The court rejected this justification and struck down the regulations, holding that the government lacked any compelling interest in encouraging racially-connected diversity in broadcast programming content. In so concluding, the court relied on some of the same Supreme Court opinions cited by the *Hopwood* court.[26] The court also held that even if a compelling interest in diversity did exist, the FCC's broad affirmative action requirements were not narrowly tailored to achieve that goal. Like the *Hopwood* court, therefore, the *Lutheran Church* court adopted a narrow view of the kinds of governmental interests that can qualify as compelling, rejecting in particular any compelling interest in racial "diversity." The D.C. Circuit did not, however, go as far as did the *Hopwood* court in suggesting that *only* remedial interests qualify as sufficiently compelling to sustain race-conscious governmental programs.

In contrast to *Hopwood* and *Lutheran Church*, three other circuits have recognized a broader range of governmental interests compelling enough to justify race-conscious decision making. The first such decision is *Wittmer v. Peters*,[27] decided by the Seventh Circuit in 1996. Illinois ran a "boot camp" program for young, nonviolent criminal offenders, designed to reduce jail time and reform the inmates. The prison adopted a racial preference in hiring officers for the camp, hiring African-Americans over white candidates who scored higher on the hiring test. The justification provided for the racial preference was that because sixty-eight percent of the program's inmates were African-American, the boot camp's program of "pacification and reformation" could not be successful without a reasonable proportion of African-Americans among the supervisory staff, and that without racial preferences such a reasonable proportion could not be achieved. In an opinion by Judge Posner, the court accepted this argument, citing expert testimony presented by the prison supporting its position.[28] Along the way, Judge Posner rejected as dicta any

[24] 141 F.3d 344 (D.C. Cir. 1998); *see also* MD/DC/DE Broad. Ass'n v. FCC, 236 F.3d 13 (D.C. Cir. 2001) (striking down successor to FCC rule struck down in *Lutheran Church*, but on narrow tailoring grounds).

[25] *Lutheran Church*, 141 F.3d at 354.

[26] *Id.* at 354-55.

[27] 87 F.3d 916 (7th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1997).

[28] *Id.* at 920-21.

statements by the Supreme Court (and by the Fifth Circuit in *Hopwood*) suggesting that *only* remedial interests could be sufficiently compelling to justify race-based actions.[29] In reaching that conclusion, the court pointed out that surely "separation of the races in a prison that was undergoing a race riot would not violate the Constitution," and that therefore the universe of possible compelling interests was not so limited.[30] Instead, all that was required was that the challenged governmental action be "motivated by a truly powerful and worthy concern. . . ."[31] In other words, the Seventh Circuit treated the identification of compelling governmental interests as an ad hoc question of public policy, rather than as an abstract legal question.

Another recent case adopting a broad, ad hoc policy approach towards compelling interests is the Ninth Circuit's recent decision in *Hunter ex rel. Brandt v. Regents of the University of California.*[32] *Hunter* involved admissions to an elementary school operated by the Graduate School of Education and Information Studies of the University of California at Los Angeles. The school took explicit account of race and ethnicity (as well as other factors) in making admissions decisions, and this was challenged as a violation of the Equal Protection Clause.[33] The court upheld the program under a strict scrutiny analysis, holding in particular that the University had a compelling interest in "operating a research-oriented elementary school," and therefore the school was justified in using racial criteria in admissions to ensure that the student body at the school provided an appropriately representative and diverse sample for research purposes.[34] Along the way, the court rejected any notion that "only an interest in remedying past discrimination can justify" governmental use of race, stating that the "Supreme Court has never held that only a state's interest in remedial action can meet strict scrutiny."[35] The court then went on, like the *Wittmer* court, to treat the question of which governmental objectives qualify as "compelling" as one requiring an open-ended assessment of the strength of a public policy, which in this case turned on the importance of education to the functions of local and state governments. The court also concluded that the admissions policy was narrowly tailored to achieve the school's compelling interest, and so upheld the school's policies.[36] A dissenting opinion by Judge Beezer

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[29] *Id.* at 919.

[30] *Id.*

[31] *Id.* at 918.

[32] 190 F.3d 1061 (9th Cir. 1999), *cert. denied*, 531 U.S. 877 (2000).

[33] *Id.* at 1062-63.

[34] *Id.* at 1064.

[35] *Id.* at 1064 n.6.

[36] *Id.* at 1067. The Ninth Circuit recently held (consistent with its *Hunter* opinion) that diversity was a compelling interest sufficient to justify race-based admissions at the University level, but on the narrow grounds that Justice Powell's opinion in *Bakke* constituted binding precedent. Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 2192 (2001).

disagreed with the majority on both aspects of its analysis, and argued in favor of the *Hopwood/Lutheran Church* position that nonremedial interests could never be sufficiently compelling to justify race-conscious decision making by the government.[37]

Finally, in *Brewer v. West Irondequoit Central School District*,[38] the Second Circuit considered the constitutionality of a voluntary interdistrict transfer program among a group of New York State school districts, which restricted transfers based on the race of the student. Specifically, the program permitted only minority students to transfer from Rochester, an urban, predominantly minority school district, to a neighboring suburban district, and permitted only white students to transfer into the Rochester district from the suburbs. The stated purpose of the program was to reduce "racial isolation" within the various school systems,[39] so the court was forced to consider whether reducing racial isolation (or as the court put it, reducing de facto segregation) could qualify as a compelling governmental interest. After reviewing the relevant caselaw, including the *Hopwood* and *Wittmer* decisions as well as cases from the Supreme Court, the court concluded that current law did not limit compelling interests to the remedial setting, and that, in fact, binding authority from the Second Circuit explicitly recognized the desire to reduce de facto segregation as a compelling governmental interest justifying race-conscious actions.[40] Ultimately, the court reversed a preliminary injunction granted to the plaintiff, and remanded the case to the district court for a factual determination of whether the challenged program fit within the rationale of the earlier circuit precedent. Thus, like the Seventh Circuit in *Wittmer* and the Ninth Circuit in *Hunter*, the Second Circuit explicitly rejected the notion that remedying past discrimination was the only compelling governmental interest that could justify decisions based on race. It should be noted, however, that by treating its precedent as binding on this issue, the Second Circuit clearly treated the existence of a compelling interest as at least in part a legal question, and thus not an entirely ad hoc inquiry into public policy.[41]

The five decisions discussed above—*Hopwood, Lutheran Church, Wittmer, Hunter*, and *Brewer*—represent the most explicit attempts in recent years by the United States Courts of Appeals to wrestle with the vexing issue of identifying the range of possible compelling inter-

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[37] *Hunter*, 190 F.3d at 1070-73 (Beezer, J., dissenting). Judge Beezer cited a number of cases from other circuits that purport to limit compelling interests to the remedial setting, *id.* at 1070-71, but with the exception of *Hopwood* and *Lutheran Church*, most of those statements are probably best understood as dicta.

[38] 212 F.3d 738 (2d Cir. 2000).

[39] *Id.* at 742.

[40] *Id.* at 747-49.

[41] *See id.* at 750 ("[W]e held [in previous decisions] that, as a matter of law, the state has a compelling interest in ensuring that schools are relatively integrated.").

ests in the equal protection context.[42] A number of other recent circuit court opinions have circled around this question, but have declined to adopt definitive positions (preferring instead to resolve the cases before them on narrow tailoring grounds).[43] Two decisions are illustrative. In *Wessmann v. Gittens*,[44] the First Circuit was faced with a challenge to race-based admissions policies at the Boston Latin School, a magnet school within the Boston public school system. The court considered, but declined to adopt, the argument that "remedying past discrimination is the only permissible justification for race-conscious action by the government," rejecting any statements in the caselaw to that effect as dictum.[45] The court also declined to adopt the *Hopwood* position that diversity will *never* qualify as a compelling interest, concluding that the caselaw on this point remained unsettled. Instead, the court concluded that as a factual matter, the defendants in *Wessmann* had failed to demonstrate that their policies really advanced diversity in any meaningful way.[46] Similarly, in *Tuttle v. Arlington County School Board*,[47] the Fourth Circuit struck down a race-based admissions policy for a public school (in this case, an "alternative kindergarten") designed to achieve "racial, ethnic, and socioeconomic diversity." Like the *Wessmann* court, the Fourth Circuit concluded that the question of "whether diversity is a compelling governmental interest" is inconclusive under both Supreme Court precedent and most circuit court opinions (with the notable exception of *Hopwood*). The court itself declined to resolve the question, striking down the admissions policy instead on narrow tailoring grounds.[48]

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[42] Several recent district court decisions have, however, explicitly addressed this issue. In the context of a challenge to undergraduate admissions practices at the University of Michigan, the U.S. District Court for the Eastern District of Michigan adopted the *Wittmer/Hunter* view that compelling interests were *not* limited to the remedial setting, and indeed that diversity could constitute a compelling interest. Gratz v. Bollinger, 122 F. Supp. 811, 821-22, (E.D. Mich. 2000) ("[A]pplicable Supreme Court precedent has never held [that remedying past discrimination] is the only compelling state interest that can ever justify racial classification."). On the other hand, another court in the same district, addressing a challenge to race-based admissions policies at the University of Michigan Law School, adopted precisely the opposite position, holding that diversity is not a compelling interest, and further that remedying past discrimination was the *only* permissible justification for race-based governmental action. *See* Grutter v. Bollinger, 137 F. Supp. 2d 821, 848-49 (E.D. Mich. 2001), *stay granted*, 247 F.3d 631 (6th Cir. 2001). Presumably the Sixth Circuit will soon resolve this split in authority.

[43] In this respect, the courts of appeals have imitated the tendencies of the Supreme Court. *See* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 307-08 (1997). I have elsewhere suggested that the judicial focus on means scrutiny raises issues of both competence and legitimacy. *Id.* at 321-22.

[44] 160 F.3d 790 (1st Cir. 1998).

[45] *Id.* at 795.

[46] *Id.* at 795-800.

[47] 195 F.3d 698 (4th Cir. 1999) (per curiam), *cert. dismissed*, 529 U.S. 1050 (2000).

[48] *Id.* at 704-05; *see also* Johnson v. Bd. of Regents, 263 F.3d 1234, 1250-51 (11th Cir. 2001) (stating that "we do not decide today whether or when student body diversity may be a compelling interest for purposes of strict scrutiny review under the Equal Protection Clause of the

Court's jurisprudence and its implications for the structure of equal protection doctrine.

C. Tiers of Scrutiny and the Court: Less Than Meets the Eye

One of the great, overarching themes of the Supreme Court's jurisprudence of individual rights in the past half-century has been the doctrinal dominance of the concept of "tiers of scrutiny." The familiar three ascending tiers of scrutiny consist of rational basis review, intermediate scrutiny, and strict scrutiny. From its roots in equal protection doctrine, and in particular, in the Japanese-American internment cases of World War II,[53] the concept of tiers of scrutiny has come to dominate the Court's individual rights doctrine, including free speech law and the law of privacy.[54] Remarkably, however, despite its sweeping embrace of the concept of tiered review, the Supreme Court has paid essentially no attention to the practical details of that review. In particular, as numerous commentators have noted, the Court has failed to develop any coherent framework regarding how, in applying the tiers of scrutiny, courts are to assess whether the governmental interest asserted satisfies the requirements of the level of scrutiny at issue: i.e., is the interest "legitimate" in the context of rational basis review, is it "important" for intermediate scrutiny, and is it "compelling" if strict scrutiny is invoked.[55] Instead, the tiers of scrutiny have evolved sub silentio so that the highest level, strict scrutiny, equates to an almost automatic conclusion of unconstitutionality,[56] and the lowest, rational basis review, leads to an equally likely result of constitutionality.[57] Intermediate scrutiny, on the other hand, is probably best understood as a form of ad hoc balancing, where the importance of government's proffered interest is weighed against the

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[53] *See supra* note 51.

[54] For a description of this historical evolution, *see* Bhagwat, *supra* note 43, at 303-06.

[55] The commentary is summarized in Bhagwat, *supra* note 43, at 307-08.

[56] For some rare counterexamples, see *Burson v. Freeman*, 504 U.S. 191 (1992) (holding that a ban on campaign activity near polling places passes strict scrutiny and therefore does not violate the First Amendment); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (holding that forced inclusion of women in a male civic association passes strict scrutiny under the First Amendment); and *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding executive order that excluded Japanese-Americans from particular areas under strict scrutiny analysis).

[57] Again, there are some counterexamples, the most prominent recent example of which is *Romer v. Evans*, 517 U.S. 620 (1996), where the Court found no rational basis for a Colorado amendment that prohibited government measures to prevent discrimination on the basis of sexual orientation. *See also* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (finding no rational basis in denying a special use permit for a group home for the mentally retarded); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (finding no rational basis for an Alabama statute that gave lower tax rates to Alabama companies); United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (holding that the Food Stamp Act's discrimination against unrelated persons living together was not rationally related to a legitimate government interest).

The above cases demonstrate a fundamental divide among the Courts of Appeals regarding the kinds of governmental interests that can qualify as sufficiently "compelling" to justify race-conscious decision making.[49] This division is unsurprising, given the importance of the issue and the lack of clear guidance from the Supreme Court in the area. What is surprising, however, is that the federal appellate decisions discussed above disagree not only on the final legal conclusion regarding what interests are compelling, but also on the fundamental methodology that a court should follow in identifying compelling interests. Some courts, such as those in *Hopwood* and *Lutheran Church*, treat the question as an entirely legal one, to be answered by employing interpretive methodologies and traditional legal tools such as the use of precedent. Others, notably those in *Wittmer* and *Hunter*, and to some extent *Brewer*, treat the question as turning on the government's ability to convince a reviewing court that it needs to take account of race in order to achieve a worthy public policy objective. Indeed, *Hunter* suggests that the worthiness of the goal—in that case, conducting educational research—is in part a factual question susceptible to proof.[50] This confusion is somewhat surprising given that the strict scrutiny analysis, and the requirement of "compelling government interests," are hardly new concepts.[51] The truth is, however, that despite its modern emphasis on (even obsession with) tiers of scrutiny, the Supreme Court has entirely failed to grapple with the methodological questions of how compelling governmental interests are to be identified, and how strict scrutiny is to be applied. The current state of confusion among the Courts of Appeals in this area thus reflects a fundamental ambiguity and gap in the very structure of the Supreme Court's modern equal protection jurisprudence. Astonishingly, however, the Court has shown no interest in addressing this issue and has consistently denied certiorari in cases raising it.[52] The balance of this paper will explore the nature of this lacuna in the

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Fourteenth Amendment," but also noting that "[t]he weight of recent precedent is undeniably to the contrary"); Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 130 (4th Cir. 1999) (choosing to leave unresolved question of whether diversity is a compelling governmental interest).

[49] *See* Builders Ass'n of Greater Chicago v. County of Cook, 256 F.3d 642, 644 (7th Cir. 2001) (noting that "[w]hether nonremedial justifications for 'reverse discrimination' by a public body are ever possible is unsettled" and citing cases recognizing division).

[50] 190 F.3d at 1063-64.

[51] The concept of strict scrutiny seems to have made its appearance in the Japanese-American internment case, Korematsu v. United States, 323 U.S. 214, 216 (1944) (stating that race-based categories are "immediately suspect" and therefore "courts must subject them to the most rigid scrutiny"). The term "compelling government interest" was first introduced in Justice Frankfurter's concurring opinion in *Sweezy v. New Hampshire*, 354 U.S. 234, 265 (1957) (Frankfurter, J., concurring in the result) ("For a citizen to be made to forego even a part of so basic a liberty as his political autonomy, the subordinating interest of the State must be compelling."). *See generally* Bhagwat, *supra* note 43, at 306-07 & nn. 25-27.

[52] In particular, the Court has denied certiorari in the *Hopwood*, *Wittmer*, and *Hunter* cases discussed above.

burden on individual rights.[58] It is difficult to say why exactly the Supreme Court, having articulated and emphasized the importance of tiered review, has failed to consider in any detail the nature of that review. I suspect at least part of the explanation lies in the peculiar institutional nature of the modern Supreme Court, with its exclusive focus on rulemaking and doctrine at the expense of any awareness or (apparently) interest in the practical import of the rules it makes.[59] Also, there has been no pressing need for the Court to address these questions because three-tiered review has seemingly plodded along, without any theoretical framework to support it, because of the implicit understandings described above regarding the practical consequences of each of the tiers. The recent decisions of the Court extending strict scrutiny review to *all* race-conscious governmental decision making, however, have brought this internal tension to a head, and have forced the courts (albeit to date only the lower courts) to confront current law's failure to determine exactly what sorts of governmental interests qualify as "compelling."

The source of the recent crisis in equal protection jurisprudence is that under the current understanding, the consequence of extending strict scrutiny to even benign, race-conscious decision making would be that almost all such governmental programs, including all set-asides and affirmative action programs, would be flatly unconstitutional. It is clear, however, that large portions of the judiciary (to say nothing of society at large) are not comfortable with this result. Even on the Supreme Court, members of the very *Adarand* majority that extended strict scrutiny to all federal race-conscious decision making went out of their way to emphasize that the extension of strict scrutiny in that case did *not* spell the end of all race-based action designed to benefit minority groups.[60] Furthermore, decisions such as *Wittmer*, *Hunter*, and *Brewer* demonstrate that many lower court judges are also not willing to accept the most extreme implications of applying strict scrutiny to benign race-conscious state action. Of course, not all judges feel this way—the results in *Hopwood* and *Lutheran Church* suggest that some federal judges are perfectly comfortable with a legal regime condemning all race-conscious government actions; but these judges do not seem to represent any sort of a consensus.[61] Thus the

[58] For a description, and defense, of this form of balancing, see Bhagwat, *supra* note 43, at 351-55.

[59] For a detailed discussion of the institutional peculiarities of the modern Supreme Court, and their implications for doctrinal development, *see generally* Bhagwat, *supra* note 17, at 992-1003.

[60] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995), *cert. granted sub nom.* Adarand v. Mineta, 121 S. Ct. 1401 (2001), *cert. dismissed as improvidently granted*, 122 S. Ct. 511 (2001); *cf.* 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment) (denying possibility that governments may ever "have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction").

[61] It should be noted that the courts that decided the *Hopwood* and *Lutheran Church* cases, the Fifth and District of Columbia Circuits respectively, are among the most conservative appel-

affirmative action cases have forced courts, for the first time, to put some systematic content into the strict scrutiny standard that has been in existence for over half a century, and in particular, have forced the courts to confront the question of how exactly they are to identify "compelling" governmental interests.

As noted above, two distinct jurisprudential approaches to this question have emerged among lower court judges: some courts and judges treat the identification of compelling interests as an ad hoc policy question, to be determined on a case-by-case basis, while others treat it as a question of law, requiring interpretation, fidelity to precedent, and application of principles of stare decisis. The former approach tends to permit courts to uphold race-conscious programs that they feel are "worthy," while the latter has generally resulted in the invalidation of programs, based in part on the view that Supreme Court precedent permits such programs only for narrow, remedial purposes.[62] Both positions can find some support in opinions of the Supreme Court, but neither has been definitively adopted by the Court, which has so far failed to confront head-on this underlying, theoretical issue regarding its tiers of scrutiny. For the time being, therefore, the debate remains unresolved.

II. SOME IMPLICATIONS OF THE STRICT SCRUTINY DEBATE

A. Compelling Interests: Policy or Law?

The ultimate question dividing the courts of appeals in their quest to identify compelling governmental interests might be stated thus: is the assessment of whether a particular, proffered governmental interest is or is not compelling at bottom an ad hoc judicial evaluation of the societal importance of the policy being pursued; or is it a question of constitutional law, to be determined through an examination of precedent, and ultimately through a process of constitutional interpretation? A complete answer to this extraordinarily difficult question raises profound issues about judicial competence, and the justifications for the institution of judicial review in the first place, and so must remain beyond the scope of this Article. A number of commentators, including myself, have, however, examined these questions in some detail elsewhere.[63] Some of the conclusions reached there have important implications for the discussion here, and are worth summarizing briefly.

First, courts are quite bad at the kind of empirical, forward-looking and predictive analysis required by the means scrutiny prong

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late courts in the country.

[62] *See supra* notes 18-38 and accompanying text.

[63] This commentary is discussed, and the conclusions that follow are set forth in detail, in Bhagwat, *supra* note 43, at 321-25.

of the Court's strict scrutiny test.[64] In particular, courts are almost certainly better at identifying and evaluating governmental purposes within a legal framework than they are at evaluating the suitability of governmental "means."

Second, courts are also inherently poorly suited, as an institutional matter, to make ad hoc policy judgments regarding the strength and worthiness, the "compellingness" as it were, of governmental policy objectives. In our system of government, such judgments are quintessentially the kind which are left to legislatures and the democratic process. Therefore, when courts second-guess the importance of governmental objectives, the countermajoritarian difficulty is raised in its starkest form.

Third, in contrast to the legitimacy problem described above, courts are actually quite good as a matter of institutional *competence* at determining the actual intent underlying governmental actions. Courts are also well-suited, in terms of both competence and legitimacy, to interpret and apply the Constitution.

Finally, in the context of governmental actions that burden core constitutional rights, the application of ad hoc doctrinal analysis is extremely dangerous. It gives courts open-ended discretion to uphold governmental action if the government's reasons for acting seem sufficiently weighty to the reviewing court, and over time it tends to lead to the evisceration of the underlying rights.[65] This criticism extends both to ad hoc balancing in general, and more specifically to ad hoc analysis regarding any component of a doctrinal test, such as the identification of compelling interests.[66] Indeed, there may be little difference between these modes of analysis since in practice in the strict scrutiny cases discussed above, the question the courts seem to be asking is whether the governmental interest at issue is *sufficiently* compelling or worthy to justify this particular use of racial classifications—which is at bottom simply a question of balancing. These concerns about ad hoc analysis are raised in the context of judicial evaluation of benign race-based actions because there is a great deal of continuing societal disagreement about the propriety of such actions. As a consequence, there is a possibility that judges and other

[64] Recall that the strict scrutiny test requires a court to determine if the government's actions advance a compelling interest, and are narrowly tailored to advance that interest. *See supra* note 8 and accompanying text. Indeed, all three tiers of scrutiny require courts to evaluate both governmental ends and governmental means.

[65] This is not to suggest that ad hoc balancing is *never* justified in constitutional law. Indeed, in my view ad hoc balancing is inevitable when the constitutional rights at issue are peripheral and (which may be saying the same thing) the limits on governmental power are less severe than in cases where the core of a constitutional provision is threatened by a governmental action.

[66] The classic critique of ad hoc balancing is of course T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987). For an exposition of the idea that balancing tends to eviscerate core constitutional rights, see Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 CONN. L. REV. 961, 993-1001 (1998).

decision makers will employ ad hoc analysis to justify and uphold race-conscious governmental decision making, thereby undermining the lesson of the Supreme Court's decisions that such programs should be considered highly suspect, and presumptively unconstitutional. Such concerns almost certainly underlie the broad statements to be found in Supreme Court opinions suggesting that race-conscious programs must be reserved for narrow, remedial settings.[67]

The ultimate implication of these arguments seems clear: in the context of true strict scrutiny analysis, the identification of compelling interests should not, as a matter of constitutional theory, be an entirely ad hoc policy analysis. Instead, it should be a legal question, rooted in constitutional principles, and in particular in the constitutional text at issue in the case being decided—i.e., the constitutional text that is the source of the asserted right. Put differently, and probably more accurately, the identification of compelling interests should be understood as an interpretive exercise, aimed at determining the contours and limits of a constitutional right. This form of analysis, which I have described elsewhere as "limited purpose analysis," meets the objections to ad hoc analysis described above, and therefore provides sufficient protection to core constitutional rights while also protecting the institutional legitimacy of the courts.[68]

The above analysis may seem peculiar, but it in fact makes perfect sense when one remembers the fundamental nature of rights. Rights, after all, operate and are best understood not as free floating entitlements belonging to individuals, but as specifically defined *limits* on governmental power and governmental motives. Seen through this lens, compelling interest analysis becomes not an ad hoc inquiry into the strengths of governmental policies, but rather an effort to determine the precise content and shape of the limits on state authority imposed by the Constitution by interpreting constitutional text. Only thus can the idea of rights as trumps be reconciled with the reality that rights as baldly stated do *not* impose absolute limits on governmental power.

Therefore, if the Supreme Court is serious that benign, race-conscious governmental programs are as constitutionally suspect, and should be subject to the same level of scrutiny, as other types of actions subject to strict scrutiny such as Jim Crow segregation and content-based restrictions on speech, then the universe of compelling interests sufficient to justify race-conscious government actions should be very limited, and that universe should be identified on the basis of

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[67] *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting). *Cf.* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment), *cert. granted sub nom.* Adarand v. Mineta, 121 S. Ct. 1401 (2001), *cert. dismissed as improvidently granted*, 122 S. Ct. 511 (2001).

[68] For a more detailed exposition of this argument, see Bhagwat, *supra* note 43, at 338-51.

constitutionally rooted principles. So far, then, it would appear that in the debate among the courts of appeals, the better position is the *Hopwood/Lutheran Church* view that compelling interests should be identified as a matter of law and that only remedial interests qualify as compelling in the context of challenges to race-conscious decision making. The difficulty is that the position advocated by the Fifth Circuit and to some extent the District of Columbia Circuit, that only remedial interests qualify as compelling, and in particular, that the government has no interest in advancing racial diversity, has been justified only by citations to intermittent statements in assorted Supreme Court opinions, which themselves are largely unsupported by any interpretive analysis. Neither the appellate courts nor the Supreme Court has explained why, as a matter of constitutional interpretation, the Equal Protection Clause of the Fourteenth Amendment should be understood to preclude the government from seeking to foster a minimum level of racial diversity within its programs and institutions—i.e., to foster a desegregated society. Indeed, one would think that the history of the Fourteenth Amendment would lead to precisely the opposite conclusion, that ending segregation—whether de facto or de jure—qualifies as among the most compelling of governmental interests.[69] So, the argument set forth here does not justify the results in the *Hopwood* or *Lutheran Church* cases. Interestingly, however, it does undermine the reasoning, and probably also the results, in the *Wittmer* and *Hunter* cases, because the theoretical approach outlined here is entirely inconsistent with the Seventh and Ninth Circuit's view that the search for compelling interests requires an ad hoc evaluation of the importance of a governmental policy. And it is difficult to imagine how the compelling interests identified in those cases—running a prison program and conducting educational research, respectively—can be derived from equal protection principles. The Second Circuit's *Brewer* decision, however, seems entirely consistent with this analysis because the compelling interest in that case, reducing racial isolation, seems to have obvious roots in equal protection principles.

The above discussion is probably something of a red herring. One suspects that most courts (and even most members of the Supreme Court) are not really comfortable with the idea that affirmative action, and other race-conscious actions that benefit racial minorities, are truly "the same as," and as constitutionally suspect as Jim Crow segregation. Indeed, it is difficult to believe that most judges

[69] Note that this is quite a different statement from suggesting that de facto segregation in itself violates the Fourteenth Amendment, which under modern caselaw it clearly does not. This is also not to say that any and all attempts to create racial diversity through explicitly racial preferences is consistent with the Equal Protection Clause. For example, I am dubious if the Equal Protection Clause permits states to engage in pure racial balancing through a system of racial quotas. *See* Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 705 (4th Cir. 1999).

consider such benign race-based actions to be more problematic than gender discrimination, which is after all subject to only intermediate scrutiny.[70] Put in terms of compelling interest analysis, it is hard to believe that the universe of governmental interests that would justify racial classifications benefiting minorities is really the same as the universe that would justify malignant discrimination against minorities. It is to this question—the purported equivalence under the Court's current doctrine of *all* official uses of racial classifications—that I now turn.

B. Benign and Malignant "Discrimination": The Problem of Equivalence

Under the Court's current doctrine, any governmental action which takes account of race is subject to exactly the same level of constitutional review, strict scrutiny. This is true regardless of who the governmental body is, and what racial groups are harmed or benefited by the action. This doctrinal position would seem to suggest that at least from a constitutional perspective, benign race-conscious actions really are indistinguishable from racial discrimination as traditionally understood.[71] And indeed, there is support from at least

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[70] *See* Nguyen v. INS, 121 S. Ct. 2053 (2001); *cf.* United States v. Virginia, 518 U.S. 515, 532 (1996) (recognizing "a strong presumption that gender classifications are invalid") (internal citations omitted).

[71] Here (and throughout this Article) I assume, perhaps heroically, that it is possible to meaningfully distinguish between benign and invidious discrimination. Admittedly, however, it is far from obvious how exactly to formulate a legal rule distinguishing between these types of race-conscious actions. Perhaps the most common approach is to distinguish between actions that harm members of racial minority groups who have been historically discriminated against, and actions that benefit members of such groups. *See, e.g.*, Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After* Adarand *and* Shaw, 149 U. PA. L. REV. 1, 26-37 (2000). Under current Supreme Court precedent, in drawing this distinction one presumably would focus on whether the *purpose* of a particular action is to harm or benefit such persons. *See, e.g.*, Califano v. Webster, 430 U.S. 313 (1977) (holding that statute that operated to redress past economic discrimination against women by paying them slightly higher old-age benefits than similarly situated men was not unconstitutional); Washington v. Davis, 426 U.S. 229 (1976) (holding that without evidence of a discriminatory purpose, a police entrance test was not unconstitutional simply because African-Americans failed at a higher rate than whites). Notice that under such an approach, most government actions segregating people by race would be invidious, but in some instances (consider the example of segregating prisoners during a prison race riot) segregation might be considered non-invidious because it was not intended to harm minorities.

Another, perhaps more promising, approach would be to focus on what Deborah Hellman describes as the "expressive content" or the "social meaning" of the governmental policy, and to find invidious only policies that express the meaning that the government "values some of us more than others." Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 3, 13 (2000), *citing* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960). *See also* Shaw v. Reno, 509 U.S. 630, 647-48 (1993). As Professor Hellman convincingly argues, such an approach does seem to harmonize well with the caselaw and with our instincts about the nature and purposes of equal protection.

Finally, the distinction between invidious and benign race-based actions might also be drawn based on whether the majority-race on the relevant governmental decision making body

some members of the Court for precisely such a view.[72] In practice, however, it seems clear that most members of the Court do not believe in this purported equivalence, for obvious reasons relating to the historical context and purposes surrounding the adoption of the Fourteenth Amendment. Thus Justice O'Connor's majority opinion in *Adarand* goes out of its way to emphasize that in this context strict scrutiny is *not* fatal in fact, and that the government will sometimes have sufficient reason to engage in race-based action.[73] And yet, as Justice Ginsburg points out in her *Adarand* dissent, the Court's decisions since its infamous *Korematsu* opinion firmly establish that when a racial classification *does* harm previously-discriminated-against minorities, such a classification *is* automatically invalid.[74] Obviously, behind the facade of doctrinal unity, something is lurking.

The lack of equivalence between these two types of race-conscious actions is also evident from the decisions of the courts of appeals. *Wittmer v. Peters* is a prime example. In *Wittmer*, the Seventh Circuit, in an opinion by Judge Posner, upheld a hiring policy favoring an African-American candidate at a prison "boot camp" program, because of the empirically proven need for African-American supervisors in such a program given that a large majority (sixty-eight percent) of the inmates in the camp were African-American.[75] Presumably this is because the minority inmates would not have cooperated with an all-white supervisory group. But now, switch the races. Imagine a primarily white prison population, and a prison system which grants hiring preferences to white guards and supervisors because of the inmates' hostility to African-Americans in those positions. It seems extremely unlikely that any court would uphold such an action in this day and age, and there is in fact support in the Court's caselaw for the proposition that a government may not make decisions which take account of, and effectuate, private racial prejudice.[76] Similarly, it

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was burdening itself or others. *See Croson*, 488 U.S. at 495-96 ("The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for . . . the application of heightened judicial scrutiny in this case."). In any event, while a full resolution of this question is beyond the scope of this paper, like Justice Marshall, I have no doubt that in most cases the distinction between benign and invidious discrimination will not be difficult to draw. *See id.* at 551-55 (Marshall, J., dissenting) (recognizing that a "profound difference" exists between actions that are racist and actions seeking to remedy prior racism).

[72] *See Adarand*, 515 U.S. at 241 (Thomas, J., concurring in part and concurring in the judgment) ("In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.").

[73] *Id.* at 237; *see also id.* at 229-30 (suggesting again that the government may be able to justify race-conscious actions if there is a sufficiently compelling interest).

[74] *Id.* at 275 (Ginsburg, J., dissenting).

[75] Wittmer v. Peters, 87 F.3d 916, 917 (7th Cir. 1996).

[76] The primary support for this view is *Palmore v. Sidoti*, 466 U.S. 429 (1984) (striking down decision awarding custody of child after divorce to father, because mother entered into an interracial marriage and therefore child raised in household would encounter societal prejudice).

is difficult to imagine the Ninth Circuit in *Hunter* upholding a school admissions program that disadvantaged minorities on the basis of the need for educational research. Indeed, one wonders how the *Brewer* court would have reacted had the school transfer program in that case been challenged by a minority student who was denied the ability to transfer schools because of her race.[77]

Thus courts quite clearly are more willing to uphold benign racial classifications in the face of an equal protection challenge than they would be to uphold traditional discrimination. This raises the question of what it means for the Court to say that the levels of constitutional scrutiny for these two types of governmental actions are "the same." Because in practice, they are not the same. One type of action—true, invidious discrimination—is per se, or virtually per se, unconstitutional;[78] the other—benign race-based action—is not. Therefore, in the affirmative action cases, the Supreme Court and the lower federal courts appear to have created a new tier of scrutiny, called strict scrutiny but different from the kind of strict scrutiny applied to other presumptively unconstitutional government actions, including, notably, invidious discrimination.[79] At a minimum, this level of scrutiny, which might be called relaxed strict scrutiny, permits governments to offer a wider range of governmental interests to justify their actions than might be available in other contexts, especially in comparison to invidious discrimination, where essentially no governmental interests are considered sufficiently compelling to survive review. This may not, however, be the full extent of the differences between

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Judge Posner indeed acknowledges this point in *Wittmer*, citing *Cooper v. Aaron*, 358 U.S. 1, 16 (1958) for the proposition; but he considers his case distinguishable. Perhaps, but I suspect that the primary distinction is the races of the various participants. The *Wittmer* result is particularly striking because Judge Posner is hardly known as a champion of affirmative action and similar programs. Indeed, the *Hopwood* majority relied heavily on an article previously published by Judge (then Professor) Posner in support of its reasoning. *See Hopwood*, 78 F.3d at 946 & n.30 (citing Richard Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 12 (1974)).

[77] In *Hampton v. Jefferson County Board of Education*, 102 F. Supp. 2d 358, 377-81 (W.D. Ky. 2000), the court was faced with precisely this issue, and ruled (unsurprisingly) that the exclusion of African-American students from a magnet school in order to retain racial diversity in the student body was unconstitutional.

[78] This qualification is necessary because of the possibility that in the face of some sudden social emergency such as the much-mooted possibility of a prison race riot, some race-conscious action might be upheld. *See, e.g.*, Lee v. Washington, 390 U.S. 333, 334 (1968) (per curiam); *Croson*, 488 U.S. at 521 (Scalia, J., concurring in the judgment); *Wittmer*, 87 F.3d at 919. For reasons I have already addressed, however, I question whether race-conscious action in such a setting (such as temporarily segregating prisoners in the face of a riot) can be classified as discrimination, with its requirement of invidious intent. *See supra* note 64. And if the government's response to a crisis *were* found to be motivated by invidious intent, I have no doubt that it would be struck down today. *But see Korematsu*, 323 U.S. at 214.

[79] The Court's creation of a new tier of review in the affirmative action context appears to parallel its possible creation of a new tier of seemingly heightened intermediate scrutiny in the context of gender discrimination. *See* United States v. Virginia, 518 U.S. 515 (1996) (holding that parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action).

the new and the traditional strict scrutiny. Perhaps the differences go so far that the Court does not believe that the universe of governmental interests that might justify benign, race-conscious action is limited. Rather, perhaps the Court would accept an ad hoc analysis of governmental interests in this context, as was utilized by the *Wittmer* and *Hunter* courts. In other words, perhaps the Court does not consider benign racial "discrimination" to be true discrimination at all, and thus not as constitutionally problematic and not so close to the core of what the Equal Protection Clause prohibits, as to justify "limited purpose" analysis. In effect, this would equate the new tier of scrutiny—which might then be called "ad hoc strict scrutiny"—with a form of intermediate review, albeit a heightened one where there is a "thumb on the scale" pushing towards invalidity.[80] Ultimately, the Court should and must resolve this ambiguity to provide some clear direction as to the constitutional status of race-conscious governmental programs. Until the Court does, the division among the courts of appeals is likely to persist and possibly increase, since there is little basis within the Court's jurisprudence for choosing among these possibilities.

CONCLUSION: BACK TO THE BASICS

Having waded through the doctrinal swamp that is modern equal protection law, it is time to take a step back. There is now a well-developed jurisprudence, in both the Supreme Court and at the appellate level, addressing the constitutionality under the Equal Protection Clause of benign, race-conscious governmental programs. One would think—at least if one were not a constitutional lawyer—that the basic question these cases would address would be the following: under what circumstances, and for what reasons, may a government take account of race in its decision making? Yet remarkably, an examination of the cases reveals almost no sustained attention to this issue. The *Hopwood* and *Wittmer* courts did address this question forthrightly, and reached diametrically opposite results: *Hopwood* concluded that only when the government is seeking to remedy specific, past discrimination by the precise governmental body whose actions are being challenged may it take account of race; *Wittmer* concluded that the government may take account of race whenever it has a good, strong public policy reason for doing so. No other appellate decision, however, has given the same kind of careful consideration

[80] *See* Bhagwat, *supra* note 43, at 311. Notice that under this view, the Court's analysis of affirmative action is edging towards the same kind of scrutiny as its review of gender discrimination, which also appears to be some sort of an ad hoc strict scrutiny, or heightened intermediate scrutiny review. *See supra* note 79. Deborah Hellman argues that if affirmative action is not true discrimination then it should not be subject to any scrutiny, *see* Hellman, *supra* note 71, at 17. I think, however, that Hellman goes too far in suggesting that the Equal Protection Clause places *no* limits on official use of benign racial classifications.

to the question. The *Lutheran Church*, *Hunter*, and *Brewer* decisions skirted the question, resolving the narrow issues before them but failing to adopt an analytical framework. Still other decisions such as *Wessmann* and *Tuttle* simply avoided the difficult question altogether, focusing instead on esoteric issues of means tailoring. And most remarkably, no decision of the Supreme Court has directly addressed this basic question. Instead, the Supreme Court's entire modern jurisprudence in this area has been one of adopting and inventing various tiered standards of scrutiny.

There is something wrong with a jurisprudence that fails to come to grips with the basic issues that any common-sense view would suggest must dominate analysis in an area of law. In fact, not only has the Court failed to address the basic question of when governments may take account of race, it has studiously avoided that question by adopting an abstract doctrinal standard—strict scrutiny—which masks fundamental differences regarding this question within the governing majority of the Court.[81] The fact that the Court's primary doctrinal move in this area, the expansion of strict scrutiny review, fails to provide any guidance regarding this basic question reveals the bankruptcy of modern equal protection doctrine. Indeed, the extension of strict scrutiny review to all race-conscious decisions has even less meaning than would appear, because it seems apparent that a majority of the Court does *not* believe strict scrutiny review in the context of benign racial classifications will operate the same way as review of invidious classifications. Thus, what little guidance the invidious discrimination cases might provide as to the permissibility of racial classifications cannot be extended to the benign discrimination context. As a result, the Supreme Court's equal protection jurisprudence has reached a crossroads, where if it is to give meaningful answers to the constitutional issues of the day, it must retreat from the Court's current single-minded focus on abstract tests, and delve into the real questions underlying these cases. Meanwhile, the tiers of scrutiny proliferate.

[81] *Compare* Adarand v. Pena, 515 U.S. 200, 237 (1995), *cert. granted sub nom.* Adarand v. Mineta, 121 S. Ct. 1401 (2001), *cert. dismissed as improvidently granted*, 122 S. Ct. 511 (2001) (emphasizing permissibility of race-conscious remedies for previous discrimination), *with id.* at 239 (Scalia, J., concurring in part and concurring in the judgment) (opposing remedial use of race-conscious programs), *and id.* at 240-41 (Thomas, J., concurring in part and concurring in the judgment) (denouncing all "government-sponsored racial discrimination based on benign prejudice").